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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re CRISTALINA A., a Person Coming Under the Juvenile Court Law.	B324989 (Los Angeles County Super. Ct. No. 20CCJP03593A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. VALERIE R. et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge. Conditionally affirmed and remanded with directions.

Gina Zaragoza, under appointment by the Court of Appeal, for Defendant and Appellant Valerie R.

James P. Gutierrez for Defendant and Appellant Pablo A.

Dawyn R. Harrison, County Counsel, Kim Nemoy, Assistant County Counsel, and Stephen Watson, Senior Deputy County Counsel for Plaintiff and Respondent.

On November 16, 2022 the juvenile court terminated the parental rights of Valerie R. and Pablo A. to their two-year-old daughter Cristalina A.[1] and transferred the child's care, custody and control to the Los Angeles County Department of Children and Family Services for adoptive planning and placement. (Welf. & Inst. Code, § 366.26.)[2] On appeal Pablo, the child's biological father, contends the order violated his due process rights because his inability to speak English prevented him from satisfactorily complying with the court-ordered reunification plan. Valerie contends the Department failed to fully comply with its duty to inquire whether Cristalina may have Indian ancestry as defined by the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) and related California law. (Welf. & Inst. Code, § 224.2, subs. (a), (b) & (e).)

We conditionally affirm the juvenile court's order terminating parental rights. Pablo did not appeal the October 14, 2020 disposition order, which established the case plan he now

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[1] Although frequently spelled "Christalina" in papers filed in the juvenile court and in court orders, the child's name according to her birth certificate is "Cristalina."

[2] Statutory references are to this code unless otherwise stated.

seems to challenge, and did not raise at the section 366.26 selection and implementation hearing any issue regarding his inability to speak English. Moreover, nothing in the record supports the contention that the failure of Cristalina to develop a significant bond with Pablo during the reunification period was a consequence of Pablo's language skills. However, the Department concedes, and we agree, that it failed to interview available extended family members regarding Cristalina's possible Indian ancestry as required by section 224.2. Accordingly, we remand the matter for the Department and the juvenile court to comply with their obligations under ICWA and related California law.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Dependency Petition and Termination of Valerie's and Pablo's Parental Rights*

The Department obtained a hospital hold/removal warrant for Cristalina on July 2, 2020 and filed a dependency petition pursuant to section 300, subdivisions (b)(1) (failure to protect) and (j) (abuse of sibling), on July 7, 2020. The petition noted on its face that Pablo was Spanish speaking, and the detention report stated Pablo would need the assistance of an interpreter.

At the jurisdiction/disposition hearing on October 14, 2020 the juvenile court sustained an amended petition under section 300, subdivisions (b)(1) and (j), finding Cristalina was at substantial risk of serious physical harm due to Valerie's history of substance abuse (methamphetamine and alcohol) and current abuse of alcohol, which included use of alcohol during her pregnancy with Cristalina;[3] Valerie's limited ability to care for

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[3] Cristalina was born with fetal alcohol syndrome.

the child; and Pablo's failure to protect the children from Valerie's substance abuse.[4] The court declared Cristalina a dependent child of the court, removed her from parental custody, granted Valerie and Pablo monitored visitation (with discretion for the Department to liberalize visits) and ordered both parents to participate in drug and alcohol services for a minimum of six months, submit to drug testing and complete a parenting course. Cristalina was placed with foster parents Leslie and Michael S., where she had lived since her detention in early July 2020.

A January 28, 2021 report described Valerie's and Pablo's visits with Cristalina—via video call because of restrictions in place during the most severe phases of the COVID-19 pandemic—as inconsistent and brief, lasting between five and 20 minutes. The April 5, 2021 report for the six- month review hearing similarly reported inconsistent and short visits. The court terminated Valerie's reunification services at the six-month review hearing (§ 366.21, subd. (e)) on April 14, 2021, finding she was not in compliance with the case plan, but continued the services for Pablo, who was in partial compliance.

On August 25, 2021 the Department reported Pablo had consistent in-person visits with Cristalina twice a month but was not calling her consistently because of job-related time constraints. Finding Pablo's progress had been substantial, the court continued reunification services at the 12-month review hearing in September 2021 (§ 366.21, subd. (f)).

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[4] The sustained section 300, subdivision (j), count alleged that two of Christina's siblings were prior dependents of the juvenile court and had received permanent placement services due to Valerie's substance abuse.

The Department's January 18, 2022 report stated Cristalina was thriving in the home of her foster parents notwithstanding her significant medical and developmental needs. The report indicated Pablo was continuing to participate in services and engaged in consistent in-person and virtual visits with Cristalina. However, Cristalina rarely interacted with Pablo during the visits and would not respond when he called her name. The Department had ensured a translator was present during the visits so Pablo could understand the information provided to him by the foster mother. Although the report acknowledged that Pablo said he understood Cristalina had medical and developmental issues and "wants to learn and know what to do when she returns [to his custody]," the Department remained concerned about that possibility because of Pablo's continuing relationship with Valerie and his failure to truly understand the extent of the health issues confronting the child, who required 24-hour care.

At the March 4, 2022 contested 18-month permanency review hearing (§ 366.22) the court found Pablo was in compliance with the case plan but, based on his inability to meet Cristalina's significant medical and developmental needs, there was not a substantial probability Cristalina could be returned to his custody with additional services.[5] The court terminated

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[5] The court explained, "This is an exceptional case because the father gets credit for having completed his case plan. However, this little girl has extensive medical needs. She needs 24-hour care, and she has a schedule, as referenced by [minor's counsel], of almost medical treatment needed every hour. . . . The father has completed some training, according to the [reports], but he has not been able to grasp the need as mentioned."

reunification services and set a selection and implementation hearing pursuant to section 366.26 for Cristalina. Pablo's counsel filed a notice of intent to file a writ petition (*Pablo A. v. Superior Court*, B318917), but subsequently notified this court that no petition would be filed.

The Department's June 16, 2022 report for the section 366.26 hearing stated Cristalina continued to thrive in the home of her foster parents, who were committed to providing her a permanent home through adoption. Pablo was again visiting with the child primarily remotely; most of his calls lasting only one minute or less. A subsequent last-minute-information report indicated Pablo had been visiting only twice per month and in-person visits failed to demonstrate any bond had developed between Cristalina and Pablo.

At the section 366.26 hearing on November 16, 2022, Pablo's counsel asked the court to apply the parental relationship exception to adoption, arguing Pablo had visited "regularly to the extent that his work schedule has allowed" and contending "it would be detrimental to deprive Cristalina of this continued relationship." Cristalina's counsel responded that, while there was no question that Pablo feels bonded to his daughter, the reverse was not true: "There has not been substantial evidence in this case, really at any point, that Cristalina's bond with her father is particularly strong. Her attachment seems to be with her caregivers, who have been caring for her day and night for her entire life." The court ruled Pablo had failed to establish the parental relationship exception applied; found that Cristalina was adoptable and no other exception to adoption applied; terminated Valerie's and Pablo's parental rights; and designated

Cristalina's current caregivers, Leslie and Michael S., as the child's prospective adoptive parents.

Valerie and Pablo each filed timely notices of appeal.

2. *The Department's Limited ICWA Inquiry and the Juvenile Court's No-ICWA Finding*

The social worker who prepared the Indian Child Inquiry Attachment (form ICWA-010(A)) filed with the original section 300 petition on behalf of Cristalina checked the box indicating the infant had no known Indian ancestry, and the detention report accompanying the petition stated Valerie had provided that information. The Parental Notification of Indian Status (ICWA-020) forms subsequently filed by Valerie and Pablo confirmed their understanding that they had no known Indian ancestry.

As reflected in the reporter's transcript for the July 10, 2020 detention hearing, the court did not mention ICWA; and no ICWA findings were made.[6] Nonetheless, the minute order for the detention hearing incorrectly stated the court found it had no reason to know that Cristalina was an Indian child as defined by ICWA.[7] The erroneous statement that the court on July 10, 2020

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[6] Although Valerie was present (remotely via WebEx) at the detention hearing on July 10, 2020, the court (Judge Soto) failed to ask whether she knew or had reason to know that Cristalina was an Indian child, as required by section 224.2, subdivision (c).

[7] This court has repeatedly (and, apparently, with little effect) expressed concern that, when reviewing the record in dependency cases, we too often encounter minute orders that include findings not actually made by the court. (See, e.g., *In re T.G.* (2020) 58 Cal.App.5th 275, 298, fn. 20; see generally *In re A.C.* (2011) 197 Cal.App.4th 796, 799-800 ["[w]here there is a conflict between the juvenile court's statements in the reporter's

had found ICWA did not apply was then repeated by the Department in its jurisdiction/disposition report, filed August 14, 2020,[8] as well as in subsequent reports prepared by the Department for the six-month review hearing, the 12-month review hearing, the 18-month permanency review hearing, and again in the section 366.26 report filed June 16, 2022.

The status review report filed August 23, 2022 for the September 6, 2022 review hearing repeated that a finding ICWA did not apply to Cristalina had been made on July 10, 2020, but recommended the court make an ICWA finding as to Pablo. The report did not attach the ICWA-020 form Pablo had filed two years earlier and made no mention of any ICWA-related investigation or interviews conducted by the Department. At the hearing counsel for the Department pointed out it had asked the court to make a no-ICWA finding as to Cristalina's father. In response the court (Judge Downing) stated, "Based on the information I have in the report, the court finds the court has no

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transcript and the recitals in the clerk's transcript, we presume the reporter's transcript is the more accurate"].) In this case the minute order's inaccurate account of the court's ICWA findings was amplified by the Department's assertion in its respondent's brief that such findings had actually been made at the detention hearing, citing, in addition to the July 10, 2020 minute order, two pages from the reporter's transcript that contain no reference to ICWA.

[8] The jurisdiction/disposition report also stated that both Valerie and Pablo had on August 12, 2020 again "denied any American Indian heritage."

reason to know the Indian Child Welfare Act applies or that this is an Indian child."[9]

During the period between the detention hearing on July 10, 2020 and the September 6, 2022 ICWA finding, Valerie had identified as possible placement options for Cristalina the maternal grandfather, Paul R., and a maternal aunt, Juanita G., who had adopted one of Cristalina's siblings. Juanita, in turn, provided the Department with contact information for a maternal uncle, Manuel H. Pablo, who was born in Guerrero, Mexico, advised the Department that most of his relatives lived in Mexico, but provided the name and address for a paternal aunt, Alapita R., who lived in Southern California and with whom Pablo resided during portions of the dependency proceedings. Although the Department had contact information for these extended family members, as well as for the maternal great-grandmother, for whom Paul R. was caring, and discussed Cristalina's possible placement with several of them, the Department's reports do not indicate that any of them were asked whether there was reason to believe Cristalina may be an Indian child. Nor do the reports reflect that the Department inquired whether other family members might have information concerning Cristalina's possible Indian ancestry.

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[9] Paradoxically, the minute order for the September 6, 2022 hearing does not include the court's finding that ICWA did not apply to the case.

DISCUSSION

1. *Pablo's Language-based Challenge to the Determination the Parental Relationship Exception to Adoption Did Not Apply, Not Raised in the Juvenile Court, Lacks Merit*

Pablo contends language barriers (his inability to speak English) precluded him from having meaningful visitation with Cristalina, necessary to establish the beneficial parental relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i); see generally *In re Caden C.* (2021) 11 Cal.5th 614, 636), and, as a consequence, the order terminating his parental rights violated due process.[10] This argument suffers from multiple fatal flaws.

First, as Pablo notes, visitation is an integral component of any reunification plan. (See § 362.1, subd. (a)(1)(A); *In re S.H.* (2003) 111 Cal.App.4th 310, 317.) But to the extent Pablo questions the adequacy of visitation permitted by the case plan ordered at disposition in October 2020 or the subsequent findings by the juvenile court that reasonable services, designed to aid him in overcoming the problems that led to Cristalina's removal, had been provided or offered, the time for seeking appellate review has long since passed. (Cal. Rules of Court, rule 8.406(a)(1) [appeal in dependency cases must be filed within 60 days of the challenged order]; see *In re A.R.* (2021) 11 Cal.5th 234, 246 [rule 8.406(a)(1)'s 60-day filing deadline is jurisdictional].)

Second, Pablo did not raise any issue regarding his inability to speak English or its purported impact on his visitation with Cristalina at the selection and implementation

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[10] In his reply brief Pablo also refers, without further explanation, to "cultural barriers," as well as to pandemic-related limitations on in-person visitation.

hearing at which parental rights were terminated. To the contrary, attempting to persuade the court to apply the parental relationship exception, his counsel argued Pablo had visited regularly ("to the extent that his work schedule has allowed") and through those visits had created a positive bond with his daughter. Having failed to present the language-barrier argument to the juvenile court, Pablo has forfeited it on appeal. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [forfeiture doctrine applies in dependency proceedings]; *In re Elijah V.* (2005) 127 Cal.App.4th 576, 582 ["[a] parent's failure to raise an issue in the juvenile court prevents him or her from presenting the issue to the appellate court"]; see also *In re Wilford J.* (2005) 131 Cal.App.4th 742, 754.)

Third, Pablo's argument—even were we to reach the merits—lacks any support in the record.[11] Throughout these proceedings the Department was aware Pablo spoke only Spanish, noting that fact in the section 300 petition and in its reports to the court, and provided him at all times (as did the court) with an interpreter or had him interact with a Spanish-speaking social worker. Indeed, Pablo's inability to speak English did not interfere in any significant way with his participation in the court-ordered case plan. As discussed, when Pablo's reunification services were terminated at the 18-month review hearing, the court found he was in compliance with, and had completed, the case plan but determined Cristalina's medical needs were simply too great for him to be able to meet.

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[11] As the Department points out, in his opening brief Pablo does not even attempt to support his argument with citations to the record on appeal, as required by California Rules of Court rules 8.204(a)(1)(C) and 8.412(a)(1).

As for visitation, the problem was not that Pablo spoke Spanish (particularly since Cristalina was not only developmentally delayed but also preverbal for the initial portion of the reunification period) but that his participation was inconsistent and, when he did visit, it was only for brief periods. The sporadic nature and poor quality of Pablo's visits with Cristalina were summarized in the Department's section 366.26 report: "[D]uring father's video calls with the child Christalina father usually repeats the child Christalina's name, whistles at her, and remains silent for the majority of the video call. . . . [D]uring in-person visits father attempts to engage the child Christalina by touching her although father has been informed the child Christalina does not respond well to unknown touch responses. Father is reported to take toys that are inappropriate for Christalina's age and toys that trigger her to shut down as the child is diagnosed with [fetal alcohol spectrum disorder]. The child Christalina is reported to not engage with father during visits and will avoid him at all times. [¶] Per visitation logs, father during video calls has been reported to be driving, sitting in silence, involving others in his video calls, eating lunch, walking around his job, getting in and out of his car, looking around, speaking to others surrounding him, and to call the name Christalina a few times before continuing to be distracted and not engaged." On appeal Pablo does not even attempt to explain how his inability to speak English contributed to his lack of meaningful interaction with his daughter described by the Department.

2. *The Department Failed To Adequately Investigate Cristalina's Possible Indian Ancestry*

a. *ICWA-related inquiry requirements*

ICWA and governing federal regulations (25 C.F.R. § 23.101 et seq. (2023)) set minimal procedural protections for state courts to follow before removing Indian children and placing them in foster care or adoptive homes. (*In re Y.W.* (2021) 70 Cal.App.5th 542, 551.) In addition to significantly limiting state court actions concerning out-of-family placements for Indian children (see *Haaland v. Brackeen* (2023) 599 U.S. __ [2023 U.S. Lexis 2545, pp. *17-19]; *In re T.G.* (2020) 58 Cal.App.5th 275, 287-288), ICWA permits an Indian child's tribe to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding (see 25 U.S.C. § 1911(c); *In re Isaiah W.* (2016) 1 Cal.5th 1, 8).

To ensure Indian tribes may exercise their rights in dependency proceedings as guaranteed by ICWA and related state law, investigation of a family member's belief a child may have Indian ancestry must be undertaken from the outset of the proceeding and, when appropriate, notice provided to any potentially involved tribes. (§ 224.2, subds. (a)-(c), (e); see *In re Antonio R.* (2022) 76 Cal.App.5th 421, 429; *In re Benjamin M.* (2021) 70 Cal.App.5th 735, 741-742.) In particular as it applies to the case at bar, section 224.2, subdivision (b), requires the child protective agency to ask "the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled."

(See *In re T.G., supra*, 58 Cal.App.5th at p. 290; Cal. Rules of Court, rule 5.481(a)(1).)

"The duty to develop information concerning whether a child is an Indian child rests with the court and the Department, not the parents or members of the parents' families." (*In re Antonio R., supra*, 76 Cal.App.5th at p. 430; accord, *In re Benjamin M., supra*, 70 Cal.App.5th at p. 742 ["the agency has a duty to gather information by conducting an initial inquiry, where the other party—here a parent . . . —has no similar obligation"]; see also *In re K.R.* (2018) 20 Cal.App.5th 701, 706 ["[t]he court and the agency must act upon information received from any source, not just the parent [citations], and the parent's failure to object in the juvenile court to deficiencies in the investigation or noticing does not preclude the parent from raising the issue for the first time on appeal"].)

b. *The Department failed to interview known extended family members concerning Cristalina's possible Indian ancestry*

The Department, as it now concedes, failed to comply with the express obligation imposed by section 224.2, subdivision (b), to inquire of a child's extended family members whether the child is or may be an Indian child. That mandate exists even if the child's parents deny Indian ancestry. As we have repeatedly explained, by requiring the Department to ask extended family members about the child's possible Indian ancestry, the Legislature—in an amendment to section 224.2 effective more than 18 months before the detention hearing in this case (Stats. 2018, ch. 833, § 5)—determined that inquiry of the parents alone was not sufficient. (See, e.g., *In re Antonio R.*, *supra*, 76 Cal.App.5th at p. 431; *In re Y.W., supra*, 70 Cal.App.5th

at p. 556.) "'The parents or Indian custodian may be fearful to self-identify, and social workers are ill-quipped to overcome that by explaining the rights a parent or Indian custodian has under the law. Parents may wish to avoid the tribe's participation or assumption of jurisdiction.' [Citation.] [¶] Further, parents may lack knowledge of a child's Indian ancestry even where the child's extended family members possess strong evidence of the child's possible Indian ancestry." (*In re Antonio R.*, at p. 432; see also *In re S.S.* (2023) 90 Cal.App.5th 694, 700-702 (lead opn. of Wiley, J.).)

Several of Cristalina's extended family members, both maternal and paternal, were identified during the course of these proceedings. Yet the Department made no effort (at least as reflected in reports filed with the court)[12] to ask them about Cristalina's possible Indian ancestry, even when interviewing some of those relatives about placement options for the child. And that failure persisted notwithstanding the dozens of appellate decisions in the past three years that, although disagreeing about how to determine whether the Department's violation of the law should be considered harmless, have unanimously found it was error to limit ICWA-related inquiries to a child's parents, as was done here.[13]

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[12] California Rules of Court, rule 5.481(a)(5) requires the Department "on an ongoing basis [to] include in its filings a detailed description of all inquiries, and further inquires it has undertaken, and all information received pertaining to the child's Indian status."

[13] The issue of the proper standard of prejudice to apply in ICWA inquiry cases is currently pending in the Supreme Court. (See *In re Dezi C.* (2022) 79 Cal.App.5th 769, review granted Sept. 21, 2022, S275578.)

The Department's breach of its duty of inquiry was compounded in this case by the juvenile court's complete failure to ensure the Department had complied with its statutory obligations before finding ICWA did not apply to the proceedings. (§ 224.2, subd. (i)(2) [court may make a finding that ICWA does not apply to the proceedings if the court makes a finding, supported by sufficient evidence, "that proper and adequate further inquiry and due diligence as required in this section have been conducted"].) As discussed, at the September 6, 2022 hearing at which the court finally (actually) made its no-ICWA finding, the Department's report, upon which the court purported to rely, contained no ICWA information at all, let alone a description of an adequate investigation that complied with section 224.2.

On remand the juvenile court is to direct the Department to make all reasonable efforts to interview Cristalina's maternal aunt Juanita G., maternal uncle Manuel H., paternal aunt Alapita R., maternal grandfather Paul R., and her maternal great-grandmother regarding the child's possible Indian ancestry. In addition, the Department is to make reasonable efforts to attempt to identify and thereafter to interview additional extended family members and others who have an interest in the child regarding possible Indian ancestry. The Department is to submit a report of its interviews or efforts to conduct the interviews to the juvenile court.

DISPOSITION

The November 16, 2022 order terminating parental rights is conditionally affirmed. The matter is remanded to the juvenile court for full compliance with the inquiry and, if applicable, the notice provisions of ICWA and related California law and for further proceedings not inconsistent with this opinion.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.